Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Request for Emergency Declaratory	)	CC Docket 94-102
Ruling by California State 9-1-1	)	
Program Manager	)	

CONSOLIDATED OPPOSITION OF THE CALIFORNIA STATE 9-1-1 PROGRAM MANAGER

The California State 9-1-1 Program ("California Program") through its Manager, hereby opposes the Application for Review of United States Cellular Corporation ("USCC") and the Petition for Reconsideration of Omnipoint Communications, Inc. ("Omnipoint"), both filed January 19, 1999, challenging the Declaratory Ruling of the Wireless Telecommunications Bureau ("Bureau Ruling"), DA 98-2572, released December 18, 1998.[1] We urge the full Commission to dispose promptly of both challenges, even though Omnipoint's is directed to the Bureau.[2]

---

[1] The combined effect of Sections 1.115, 1.106 and 1.4 of the Commission's rules is to establish a common date of February 3, 1999 for oppositions to the Application for Review and Petition for Reconsideration.

[2] Section 1.104(b) permits the Bureau to refer petitions for reconsideration of its actions to the full Commission, obviating the need for the sequential disposition referenced in subsection (c).

This liability issue has been addressed no fewer than three times previously and is pending before the Commission in a fourth iteration.[3] The apparent inability of some carriers to reconcile themselves to the Commission's plain answers is no reason to prolong a discussion that is delaying inexcusably the implementation of wireless E9-1-1.

USCC's arguments are erroneous, speculative and inapposite.

USCC, for example, would like to read the wireless E9-1-1 requirements as "inapplicable until the states have taken all the necessary actions to make the service viable." (Application, 5) But those are not the words of the rule. Section 20.18(f) establishes three pre-conditions only, and the third of these, a funding mechanism, is unspecific as to the treatment of liability insurance premiums because the FCC expressly has left that to local and/or state 9-1-1 authorities.

Taken as a whole, USCC's Application falls far short of the requirement of Section 1.115(b)(2) that the challenger "specify with

---

[3] Report and Order, 11 FCC Rcd 18676, 18727-28 (1996); Memorandum Opinion and Order, 12 FCC Rcd 22665, 22731-35 (1997); the Bureau Ruling under challenge here; and the Petitions for Further Reconsideration of CTIA and BellSouth, February 17, 1998.

particularity" the factors warranting Commission review. The pleading is full of undocumented threats and unsupported speculation:

> • "[E]merging conditions, especially a growing threat of liability litigation" (Application, 5)
>
> • "[M]any states have not enacted liability protection for wireless carriers and may never do so." (7)
>
> • "[T]hreat of multimillion dollar liability judgments" (7, n.6)
>
> • "[C]ompelled provision of a public service should not have as a concomitant the real threat of bankruptcy." (10)

In fact, USCC admits there is no present crisis[4] but asks the FCC to assume that a culture of litigation will somehow give birth to catastrophe:

> At present, most people do not think to sue their wireless carrier if the response to an E-911 call is, in some way, inadequate. However, given time and legal ingenuity, they will . . . (12, n.9)

In the absence of particular facts to support its Application, USCC falls back on a Section 253 claim that it is being prohibited from providing wireless service, a Section 332 argument that its entry into or charges for wireless service are being improperly regulated by California, and a Fifth Amendment assertion that its property is being taken without due process. None of these arguments holds water.

---

[4] An essentially cooperative atmosphere in California is portrayed by the Governor's Executive Order W-186-98, appended to this Consolidated Opposition.

First, USCC has not demonstrated that the treatment of wireless carrier liability in California is having the "effect" of prohibiting, much less flatly barring, USCC's provision of any aspect of wireless service in that state. As noted above, the constraints are solely a product of USCC's imagination. Even if the California Program were having such an effect, USCC fails to account for Section 253(b), which permits states to "impose, on a competitively neutral basis," protections for "public safety and welfare." In California, wireline carrier liability limitation is governed by Public Utilities Commission Rule 14, written in a form allowing for inclusion in tariffs. Subsection A.1 excepts from the limitation willful and fraudulent misconduct or violations of law. The rule does not appear to differ significantly from the tariff liability limitation mechanism available to wireless carriers in the state.[5] In any event, USCC has not shown with particularity how it is competitively disadvantaged.

Second, the FCC has never held that the effect of state-imposed "other terms and conditions" [47 U.S.C.§332(c)(3)(A)] on costs of doing business for wireless carriers is to cause the state to engage in prohibited rate regulation. In fact, the Commission could not prudently leave to non-federal

---

[5] The California wireless carrier tariffing regulations are discussed further below, in answer to statements of Omnipoint.

authorities – as it has – the details of wireless E9-1-1 funding mechanisms if these non-federal decisions were thought to impinge on rate regulation under Section 332(c)(3)(A). This same reasoning has been followed recently by the California Court of Appeal.[6]

Finally, USCC answers its own takings argument by pointing out that economic regulation not involving "physical invasion by the government" is not usually found to violate the Fifth Amendment. (20, n.11) While USCC claims to find "special force" in a takings claim in the California circumstances, its only citation (22, n.13) is to an inapposite case – involving government-ordered physical invasion – decided on statutory rather than constitutional grounds.

Informational tariffs limiting carrier liability are preferable to insurance premiums and deserve first consideration.

In earlier comments in this proceeding, the California Program noted that

> [C]ellular carriers in our state have been providing basic 9-1-1 services since 1985 with only the protection granted by tariffs in place with the California Public

---

[6] Los Angeles Cellular Telephone Company v. Superior Court of Los Angeles County, 76 Cal.Rptr.2d 894, 1998 Cal.App.LEXIS 664, n.3. ("[Section 332(c)(3)(A)] does not in any event affect the PUC's power to regulate the terms and conditions imposed by wireless service providers.")

> Utilities Commission ("CPUC"). PCS carriers also have been providing basic 9-1-1 service with no such protections. Whether there is substantial increased risk in providing E9-1-1 over basic 9-1-1 service has not been fully explored or answered. We do not view the features associated with the E9-1-1 service as necessarily increasing the risk to wireless carriers. In many ways, we view the liability risk as substantially decreased.[7]

Effectively, we invited carriers to identify the increased risk of offering E9-1-1 and what this would add to the cost of insurance premiums. None has done so.

The failure to resolve such an "actuarial nightmare" (Reply, n.3) is not surprising, given the absence of empirical data about the very new service of wireless E9-1-1. Instead, there is a better way to handle the problem for all concerned. That way involves state or federal informational tariffs that would give notice of limits on wireless carrier liability consonant with state law. The state tariff approach has been upheld recently by the California Court of Appeal.[8] We urge the FCC to clarify the preemption "demarcation

---

[7] Reply, August 24, 1998, 2-3.

[8] Note 6, *supra.* Omnipoint's assertions (Petition, 6-7) that the state court decision is "of questionable application" on the basis of chronology and possible federal preemption are not persuasive. First, the decision was upheld on a basis that had nothing to do with the timing of events, namely that the new Section 332(c)(3)(A) did not preempt state tariffing of this type. That holding answers the second concern about preemption.

point" (Bureau Ruling, n.24) by finding that the state tariff mechanism in California does not offend federal law.

Even if the FCC wishes to continue to demur on state law, it can solve the liability limitation problem by accepting the proposal of the Cellular Telecommunications Industry Association and BellSouth for federal filing of informational tariffs. (Note 3, *supra*) At a minimum, the FCC should rule on the acceptability of state or federal tariffs, as a means of limiting wireless carrier liability for E9-1-1 services, before ordering – or in any way encouraging – the inclusion of liability insurance premiums in wireless E9-1-1 funding mechanisms. There is simply no reason to invite this actuarial nightmare if the carrier self-help of tariff notice is available.

CONCLUSION

For the reasons set forth above, the Commission should (1) consider together, and deny, the USCC Application for Review and the Omnipoint Petition for Reconsideration; (2) clarify the permissibility of state liability limitation tariffs under Section 332(c)(3)(A); and/or (3) rule on the acceptability of state or federal tariffs for this purpose before addressing, in

any further detail, the question of liability insurance premiums as recoverable costs of wireless E9-1-1 implementation.

Respectfully submitted,

CALIFORNIA STATE 9-1-1 PROGRAM

By _____

Leah Senitte, Manager
9-1-1 Program
Telecommunications Division
Department of General Services
State of California
601 Sequoia Pacific Boulevard
Sacramento, California 95814

James R. Hobson
Donelan Cleary Wood & Maser,P.C.
1100 New York Avenue, N.W., #750
Washington, D.C. 20005-3934
(202) 371-9500

February 3, 1999

ITS ATTORNEY

CERTIFICATE OF SERVICE

I hereby certify that I have on this 3rd day of February 1999 served copies of the foregoing *Consolidated Opposition Of The California State 9-l-l Program Manager* by first-class mail, postage prepaid, on all parties of record in the above captioned proceeding.

Mark J. O'Connor
Omnipoint Communications, Inc.
Piper & Marbury L.L. P.
1200 19th Street, N.W., Seventh Floor
Washington, D.C. 20036

Peter M. Connolly
US Cellular Corporation
Koteen & Naftain
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036

VIA HAND DELIVERY
John Cimko
FCC
Room 7002
2025 M Street, N.W.
Washington, D.C.

Shannon R. Harris

EXECUTIVE DEPARTMENT
STATE OF CALIFORNIA

EXECUTIVE ORDER W-186-98

WHEREAS, The phenomenal growth and use of wireless technology reflects the increasing reliance that millions of Californians and Americans place on the ability to communicate easily, affordably and in a mobile environment; and

WHEREAS, California is the nation's largest market for wireless service and is served by some of the most prestigious wireless companies in the industry, including, but by no means limited to, AT&T Wireless, AirTouch Communications, LA Cellular, Pacific Bell Mobile Services, GTE Wireless, Sprint PCS, and Cellular One; and

WHEREAS, Industry research estimates that a majority of all wireless customers purchase their phones for personal safety and security reasons, including the ability to access 911 in an emergency; and

WHEREAS, The explosion in the availability of wireless phones has benefited both individuals and the California economy, but also has had an unprecedented impact on those who receive emergency response services by dialing 911; and

WHEREAS, It is now estimated that more than 85,000 calls are made each day across the nation from wireless phones to Pubic Safety Answering Points (PSAPs), or 911 centers, with tens of thousands placed in California alone; and

WHEREAS, In July 1996, the Federal Communications Commission (FCC) issued Report & Order 94-102, and subsequently Memorandum Opinion and Order 97-402, encouraging wireless carriers to provide the public safety community with enhanced data (the 10-digit call back number and location information) to allow emergency response officials to more readily and effectively provide services to wireless callers in need of assistance; and

WHEREAS, The State of California has met the three conditions set forth by the FCC after which various provisions of Report & Order 94-102 become applicable: (1) the PSAP must request the services specified in paragraphs (d) and (e) of that Order; (2) the PSAP is capable of receiving and utilizing the data elements associated with the service; and (3) a mechanism for recovering the costs of the service is in place; and

WHEREAS, In July 1996, Governor Wilson established the Wireless 911 Task Force, joining together dedicated professionals from the public and private sectors who made recommendations to help ensure a viable public safety emergency response system for wireless telephone system users; and

PAGE TWO

WHEREAS, The Wireless 911 Task Force concluded in its Report to Governor Wilson that "Today, the 911 system experiences significant delays in answering calls, jeopardizing lives, health, and property. Without intervention, these delays threaten to functionally collapse the system as new phone devices and greater use increases demand on an already overburdened system. Californians place a high priority on a responsive 911 system. Appropriate measures [are needed] to ensure a viable 911 system to maximize public safety"; and

WHEREAS, The Department of General Services and the California Highway Patrol, in partnership with the wireless industry, are currently conducting a trial of wireless Emergency 911 (E911) service in the Los Angeles area to prepare for statewide implementation of the FCC-mandated service; and

WHEREAS, The Department of General Services and the California Highway Patrol, in partnership with the private sector, should take steps to expeditiously provide this new, lifesaving technology to all wireless subscribers so as to ensure the benefits of a high quality, reliable and sophisticated E911 system.

NOW, THEREFORE, I, PETE WILSON, Governor of the State of California, by virtue of the power and authority vested in me by the Constitution and statutes of the State of California, do hereby issue this order to become effective immediately:

1. The Department of General Services and the California Highway Patrol shall implement FCC Report & Order 94-102 and Memorandum Opinion and Order 97-402 to the fullest extent authorized by law and as rapidly as technologically possible in order to provide all citizens in California with the highest quality wireless E911 service available.

2. The Department of General Services shall promote technological improvements in the E911 system to maintain the most efficient and cost effective public safety service available, and shall regularly report to the Governor and the Legislature changes to existing laws and regulations which may arbitrarily or inadvertently frustrate public safety or prevent continued technological improvement of the system.

3. The Department of General Services shall encourage and support all viable technological means of distributing wireless E911 calls among and between the California Highway Patrol and local public safety agencies.

4. The Department of General Services shall consult with representatives of the wireless communications industry and other stakeholders for the purpose of examining the issue of the industry's potential legal liability for providing emergency telephone coverage through wireless networks, and for the purpose of considering means of managing that liability.

IN WITNESS WHEREOF I have hereunto set my hand and caused the Great Seal of the State of California to be affixed this 21st day of December 1998.

Governor of California

ATTEST:

Secretary of State